TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 227.

HENRY J. HAVNOR, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 2, 1896.

(16,375.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1897.

No. 172.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State for said county, do find a certain record (except petition and opinion of the court of appeals) there remaining in the words and figures following, to wit:

[Seal of New York.]

IN THE

Supreme Court of the United States.

Ex Parte, HENRY J. HAVNOR, Petitioner.

PETITION FOR WRIT OF ERROR, requiring the Supreme Court of the State of New York to certify to the Supreme Court of the United States for its review and determination the case of The People of the State of New York against Henry J. Havnor.

TO THE HONORABLE ~~SUPREME~~ COURT OF ~~THE UNITED STATES~~ Officials of the State of New York.

The petition of Henry J. Havnor respectfully shows to this Honorable Court as follows:

I.—That your petitioner is a citizen of the United States and of the State of New York, and is a barber by trade, residing and doing business in the City of New York.

II.—That heretofore an act was passed by the Legislature of the State of New York, and is now in force, entitled, Chapter 823 of the Laws of 1895, commonly styled the "Collins Act," and which provided as follows:

"An Act to regulate barbering on Sunday.

"SECTION I.—Any person who carries on or engages in the business of shaving, hair cutting or

"other work of a barber on the first day of the
"week, shall be deemed guilty of a misdemeanor
"and upon conviction thereof shall be fined not
"more than five dollars and upon a second con-
"viction for a like offense shall be fined not less
"than ten dollars and not more than twenty-five
"dollars, or be imprisoned in the County Jail for a
"period of not less than ten days nor more than
"twenty-five days, or be punishable by both such
"fine and such imprisonment at the discretion of
"the Court or Magistrate, provided that in the City
"of New York and the Village of Saratoga Springs
"barber shops or other places where a barber is en-
"gaged in shaving, hair cutting or other work of
"a barber may be kept open and the work of a
"barber may be performed therein until one o'clock
"of the afternoon of the first day of the week.

"SECTION II.—This act shall take effect on the
"first day of June, 1895."

III.—That on the 9th day of June, 1895, your petitioner was arrested by direction of the police authorities of New York City upon the charge of violating said act on the day of the arrest (Sunday) by keeping open shop after 1 P. M. Petitioner was afterward on the fourth day of November, 1895, tried upon this charge and fined five dollars, which was paid under protest and an appeal taken from the judgment of conviction to the Appellate Division of the Supreme Court of the State of New York for the First Department, where said conviction was affirmed on the 7th day of February, 1896. That thereupon a second appeal was taken to the Court of Appeals of the State of New York from said judgment of conviction and there a decision was rendered on or about April 14, 1896, by a divided court, which stood four against three for affirmance of the said conviction. That the ground on which these two separate appeals have been taken by petitioner is the claim that Chapter 823 of the Laws

of 1895 is void, not only because it is an improper 7
exercise of the police power of the State, but void also because it is violative of the Fourteenth Amendment of the Constitution of the United States, providing that "no person shall be deprived of life, liberty or property without due process of law" and of the corresponding clause in the Constitution of the State of New York (see Article 1, Section 1).

IV.—That a transcript of the record in this case from its commencement duly certified under seal of the Clerk of the City and County of New York is hereto annexed.

V.—That your petitioner is advised by counsel 8
and verily believes that this is a case provided for by Section 709 of the Revised Statutes of the United States, in which the validity of a State statute is drawn into question, as being repugnant to the Constitution of the United States and to the rights guaranteed thereunder to citizens of the several States and where a decision of the highest State Court has been rendered in favor of said statute. That petitioner further shows that it will be not only of great importance to him to have the consitutional question involved in this case submitted for decision to the highest Court in the land, but that a final decision of the matter there would settle the doubts now existing 9
in the minds of the people of the State at large who are effected by the action of this law either pecuniarily or in suffering personal inconvenience by not having a barber's assistance for Sunday shaving.

VI.—The proof on the trial actually showed that keeping open barber shops on Sunday not only served the convenience of some, but the *actual necessities* of others who were unable to shave themselves, and needed to do so every day, in order to preserve a decent cleanly appearence.

10 VII.—The petitioner therefore maintains:

FIRST.—That by operation of the statute he is deprived of liberty, as that term is defined under the Constitution, that is freedom to carry on a *necessary and lawful occupation* at a *lawful and necessary time.*

SECOND.—That by losing the profits of Sunday business petitioner is deprived of his property as much as if the fixtures of his shop were confiscated or destroyed by the Government.

Wherefore, your petitioner prays that a writ of error may issue from this Court directed to the Supreme Court of the State of New York, to
11 which Court this case has been remitted by the New York Court of Appeals, requiring said Supreme Court to certify the said record to this Court, to the end that said case may be reviewed and determined by this Court as provided by the Revised Statutes of the United States, and that said Chapter 823 of the Laws of New York for 1895 may be declared unconstitutional, and that the judgment of conviction heretofore rendered against your petitioner under said law may be reversed, and for such other relief as to this Honorable Court may seem just.

And your petitioner will ever pray, &c.

ALBERT I. SIRE,
Attorney for Petitioner,
99 Nassau St.,
N. Y. City.

12 H. J. Havnor, Petitioner

UNITED STATES OF AMERICA, }
City and County of New York, } ss.:

HENRY J. HAVNOR, being duly sworn, says: That he is the petitioner in the foregoing petition. That he has read said petition, and knows the contents thereof. That the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn to before me, } Henry J. Havnor
April 27, 1896. }

Warren J. Bull.
Notary Public

Transcript of the Record.

13

COURT OF SPECIAL SESSIONS

FOR THE CITY AND COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

HENRY J. HAVNOR.

14

To Hon. JOHN R. FELLOWS,
District Attorney of the City and County of New York.

To THEODORE F. MCDONALD, Esq.,
Clerk of the Court of Special Sessions of the City and County of New York.

You will please take notice that the above named defendant hereby appeals to the General Term of the Supreme Court of the State of New York, hereafter to be held in the First Department thereof, from the judgment of this Court, rendered on the fourth day of November, 1895, and from all the incidents relating thereto, and from each and every part thereof, and from the whole of said judgment.

15

Dated New York, November 7, 1895.

ALBERT I. SIRE,
Attorney for Defendant-Appellant,
99 Nassau Street,
N. Y. City.

16 POLICE COURT—SECOND DISTRICT.

City and County of New York, ss.:

BERNARD MCGOVERN, of 19th Precinct, aged 27 years; occupation, police officer; being duly sworn, deposes and says: That on the 9th day of June, 1895, at the City of New York, in the County of New York, Henry J. Havnor, now here, did violate Chapter 823, Laws of 1895, at premises 57 West Thirty-third street, under the following circumstances: on said day deponent entered the defendant's premises and was shaved after one o'clock, P. M., by one of defendant's employees, while defendant was
17 present in said premises.

BERNARD MCGOVERN.

Sworn to before me this 10th day of June, 1895.

CHARLES N. TAINTOR,
Police Justice.

City and County of New York, ss.:

HENRY J. HAVNOR, being duly examined before the undersigned, according to law, on the annexed charge, and being informed that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the
18 facts alleged against him, that he is at liberty to waive making a statement and that his waiver cannot be used against him on the trial.

Q. What is your name?
A. Henry J. Havnor.
Q. How old are you?
A. Thirty-eight years.
Q. Where were you born?
A. Albany, New York.
Q. Where do you live and how long have you resided there?
A. 460 West Thirty-fourth street. Two months.

Q. What is your business or profession? 19

A. Barber.

Q. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend your exculpation.

A. I am not guilty. At one o'clock I closed.

H. J. HAVNOR.

Taken before me this 10th day of June, 1895.

CHARLES N. TAINTOR,
Police Justice.

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed and that there is sufficient cause to believe 20
the within named defendant guilty thereof, I order that he be held to answer the same and he be admitted to bail in the sum of one hundred dollars and be committed to the Warden of the City Prison of the City of New York, until he gives such bail.

Dated June 10, 1895.

CHARLES N. TAINTOR,
Police Justice.

I have admitted the above named defendant to bail to answer by the undertaking hereto annexed.

Dated June 10, 1895.

CHARLES N. TAINTOR,
Police Justice. 21

22 POLICE COURT—SECOND DISTRICT.

City and County of New York, ss.:

THE PEOPLE vs. HENRY J. HAVNOR.	On Complaint of Bernard McGovern for violation of Chapter 823, Laws of 1895.

23 After being informed of my rights under the law I hereby waive a trial by jury on this complaint and demand a trial at the Court of Special Sessions of the Peace to be holden in and for the City and County of New York.

Dated June 10, 1895.

H. J. HAVNOR.

CHARLES N. TAINTOR,
Police Justice.

24

[Endorsement:] 25

POLICE COURT—SECOND DISTRICT.

THE PEOPLE, &c., on the complaint of BERNARD MCGOVERN vs. HENRY J. HAVNOR.	Offense. Vio. of Chapter 823, Laws of 1895.

Dated June 10, 1895.

26

TAINTOR,
Magistrate.

McGovern, Officer, 19th Precinct.
Pleads N. G. on 10-24-95.

Plea of N. G. withdrawn and demurrer to be filed with District Attorney before October 26, 1895.

(Note by Counsel: Demurrer withdrawn and plea of N. G. Restored. See testimony.) Tried 11-4-95.

Sentence $5; paid W. C. H.

1st Bench. Fine paid under protest.

27

28 COURT OF SPECIAL SESSIONS.

CITY AND COUNTY OF NEW YORK.

THE PEOPLE

AGAINST

HENRY J. HAVNOR.

Before Justice W. C. HOLBROOK, Presiding; Justices HINSDALE and HAYES, Associates.

29 NOVEMBER 4, 1895.

JACOB BERLINGER, Esq., Assistant District Attorney, for the People.
ALBERT I. SIRE, Esq., for the Defendant.

The demurrer heretofore filed as ordered by the Court being withdrawn on motion of defendant's counsel a plea of not guilty was substituted therefor.

It is admitted by the defendant, and on behalf of the defendant by his counsel, that on the 9th day of June last the complainant in this case, Bernard McGovern, visited the barber shop of the defendant at five minutes past one o'clock in the afternoon, and was there shaved.

30 BERNARD MCGOVERN, the complaining witness, was now called and sworn; he is a member of the Nineteenth Precinct.

CROSS-EXAMINATION:

By Mr. Sire:

Q. What was your business on the 9th of June last?

A. Police officer.

Q. In the City of New York?

A. Yes, sir.

Q. And at whose request did you go to the barber shop of Henry J. Havnor? 31

A. Captain Pickett.

Q. What did he direct you to do?

Question objected to. Sustained. Exception by defense.

Q. At the request of Captain Pickett you went to the shop—where is that located?

A. 57 West Thirty-third street.

Q. Near the corner of Broadway?

A. Yes, sir.

Q. And after you reached there what did you do?

A. I went in there and got a shave.

Q. And after you finished being shaved what did you do? 32

A. I placed the proprietor under arrest.

By Mr. Berlinger:

Q. Did you pay him?

A. Yes, sir; twenty-five cents.

HARRY J. HAVNOR, the defendant in this action, was now sworn in his own behalf; he testifies as follows:

By Mr. Sire:

Q. Mr. Havnor, were you in busines on the 9th of June, 1895? 33

A. Yes, sir.

Q. And where was your place of business?

A. 57 West Thirty-third street, the Alpine Building.

Q. How long have you been conducting business there?

A. Nine years.

Q. And in what business were you engaged there during the past nine years?

A. Hair dressing, a barber shop and shaving.

34 Q. How large an establishment have you there; how many chairs?

A. Eleven chairs.

Q. Any baths?

A. Three baths; and two ladies' hair dressing chairs.

Q. Have you ever been charged with a violation of the law prior to the 9th of June, 1895?

A. No, sir.

Q. Now, what were your habits about keeping your shop open on Sunday afternoons?

Question objected to; sustained; exception by the defense.

35 Q. Well, did you keep your shop open Sunday afternoons?

A. Yes, sir.

Q. And for what purpose?

A. For shaving and hair cutting aud hair dressing.

By the Court:

Q. Up to the passage of this law you were in the habit of keeping open?

A. Yes, sir; until eight o'clock in the evening.

By Mr. Sire:

Q. And had you customers that it was necessary
36 to shave during the afternoon?

Question objected to; sustained; exception by defense.

Mr. Sire: I desire to show that shaving and barbering on Sunday afternoon are necessary.

The Court: We are inclined to think that you cannot prove it in that way.

Q. Had you customers that could not attend during the morning, Mr. Havnor?

Question objected to; sustained; exception.

Q. What class of people did you have there?

A. The high class, the upper ones. 37

Q. Do you know what their habits and customs were?

A. Yes, sir.

Q. State what it was?

Question objected to; sustained; exception by the defense.

Q. State any particular person who could not get there during the morning hours or prior to one o'clock in the afternoon?

A. Yes, sir, Barney Michaels.

Q. What time did he get there to get shaved, and why couldn't he get there before one o'clock?

A. His business was late at night. 38

Q. Was it necessary for him to be shaved after one o'clock?

Question objected to; sustained; exception by the defense.

Q. What time in the day was he in the habit of reaching your shop on Sundays?

A. Three or four o'clock in the afternoon.

Q. Did you have any other customers who could not get there during the morning hours?

Question objected to; sustained; exception by the defense.

Q. Did you have any customers that required shaving every day? 39

Question objected to. Objection sustained. Exception by the defense.

Q. And you had customers that were unable to shave themselves?

Question objected to. Sustained. Exception by defense.

Q. Will you name one?

A. Mr. DeCam, he stops at the Alpine.

Q. Had you any customers who were engaged in

40 the printing business, who were kept up almost every night, Saturday night, and who required shaving on Sunday afternoon?

A. Yes, sir.

Q. Were there a large number of your customers that rose late on Sunday morning, to your knowledge?

A. Yes, sir.

Q. How late on Sunday morning?

A. One or two o'clock.

The Court: What is the use in going into this testimony.

Mr. Berlinger: I hate to object.

The Court: If a man lies in bed until one o'clock
41 or after, and then comes in and violates the law, the Court has not anything to do with that.

Mr. Sire: I assume that our Honors will not pass upon the question of constitutionality, but I desire to go to the General Term of the Supreme Court and have this question passed upon.

The Court: We shall not pass upon a question of that kind here.

Mr. Sire: I desire to make my record complete here.

The Court: Proceed, we will give you every opportunity that is reasonable.

Q. Did many of your customers that were in the
42 habit of being shaved in the afternoon also take the use of your baths?

A. Yes, sir.

Q. And did many of them have beards that required cutting on Sunday afternoon?

A. Yes, sir.

Q. And also others that required shaving?

A. Yes, sir.

Q. And did you shave those same customers every day in the week?

A. Yes, sir.

Q. And were some of your customers unable to shave themselves?

A. Yes, sir.

Q. Was it necessary to shave them on Sunday afternoons? 43

A. Yes, sir.

Q. Did their beards grow so fast every day that it was a matter of cleanliness in order to have them shaved?

A. Yes, sir.

Q. Now, since your arrest on the 9th of June you have not violated the Collins's Law, this Act?

Question objected to. Sustained. Exception by the defense.

Mr. Sire: No other questions.

The Court: Is that your case?

Mr. Sire: That is my case. Now, if the Court 44
please, I move for the discharge of the prisoner on the ground that it appears from the testimony that barbering on Sunday is a work of necessity. That being so, the act which prohibits barbering on Sunday, under the decisions of the Court of Appeals of this State, would be unconstitutional, and I contend that the act being unconstitutional, the prisoner cannot be held. Now, if your Honors desire to hear me, I have my brief on that question, with the decisions rendered by the Court of Appeals. I would be glad to argue on that point. We have had a Special Term decision in the City of Brooklyn, rendered by Justice Cullen, I believe, holding the act to be 45
constitutional. We have had a Special Term decision rendered by Judge Stover, before whom I brought my application, in substance, holding the act constitutional. Therefore, I assume that your Honors would prefer to have the matter go to the General Term rather than pass upon it here.

The Court: We shall not undertake to pass upon that question. Make your formal motion, which will be denied, and we will give you an exception.

Mr. Sire: I move to dismiss the complaint, and ask that the prisoner be discharged, on the ground that

46 it appears that the work complained of was a work of necessity. And I contend that, under the decisions rendered by the Court of Appeals, the act itself is unconstitutional. That being so, the prisoner must be discharged.

Motion denied. Exception by the defense.

The Court: The Court finds the defendant guilty, and imposes a fine of five dollars. That is the only thing that can be done for the first offense.

Mr. Sire: Now, I would like to move in arrest of judgment, in order to give me an opportunity to go to the General Term of the Supreme Court.

We will pay the fine under protest.

47 Mr. Berlinger: I do not see how an arrest of judgment can be granted. He can pay his fine under protest.

The Court: That is the proper way, I believe.

The fine is paid under protest.

48

At a Court of Special sessions of the City and County of New York, held in and for the City and County of New York, at the building for Criminal Courts in said city, on Monday, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five. 49

Present—The Hons. WM. C. HOLBROOK,
ELIZUR B. HINSDALE and
JOHN HAYES,
Justices of the Court of Special Sessions.

50

THE PEOPLE OF THE STATE OF NEW YORK vs. HENRY J. HAVNOR.	On conviction by trial of the misdemeanor of violating Chapter 823 Laws of 1895 at premises 57 West 33d Street, under the following circumstances on the 9th day of June, 1895: Bernard McGovern entered the defendants' premises and was shaved after one o'clock P. M. by one of the defendants' employees while defendant was present in said premises.

It is thereupon ordered and adjudged by the Court that the said Harry J. Havnor for the misdemeanor aforesaid, whereof he was convicted, pay a fine of five dollars. Fine paid.

51

(A true extract from the minutes).

T. F. MCDONALD,
Clerk.

I, THEODORE F. MCDONALD, clerk of the Court of Special Sessions of the City and County of New York, held in and for the City and County of New York, do hereby certify that the foregoing is a copy of the notice of appeal and of the judgment roll in the case of The People against Henry J. Havnor, convicted by the said Court of a violation

52 of Chapter 823, Laws of 1895, now on file in the Clerk's office of said Court of Special Sessions, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said Court this 19th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Secs. 485, 532 and 517 Code Criminal Pro.

[L. S.] T. F. McDONALD,
Clerk.

53

NEW YORK SUPREME COURT,

GENERAL TERM—FIRST DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

vs.

HENRY J. HAVNOR,
Appellant.

54

It is hereby stipulated and agreed that the foregoing shall be taken and deemed to be a complete and correct copy of the case on appeal herein and that the said record comprises all the testimony herein and the printed case may be filed as the original.

JOHN R. FELLOWS,
District Attorney.
ALBERT I. SIRE,
Attorney for Appellant.

On the foregoing consent and stipulation it is ordered that the foregoing case on appeal be and the same are hereby settled and signed as such and that the same be placed on file as the original. 55

Dated New York, November 19, 1895.

WM. C. HOLBROOK,
Justice.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the First Department at the Court House of the said Appellate Division in the City of New York, on the Seventh day of February in the year of our Lord one thousand eight hundred and ninety-six. 56

Present—The Hons. CHARLES VAN BRUNT, *P. J.*
GEORGE C. BARRETT,
WILLIAM RUMSEY,
PARDON C. WILLIAM,
GEORGE L. INGRAHAM, } *JJ.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant. 57

The above named appellant having been at a Court of Special Sessions in and for the City and County of New York on the fourth day of November in the year of our Lord one thousand eight hundred and ninety-five in due form of law convicted of a

misdemeanor and judgment thereon duly rendered against him;

And the appellant having thereafter duly appealed from the said judgment to this Court, and the said appeal having come on to be heard in due form of law,

Now, therefore, after hearing Albert I. Sire, Esq., of counsel for the appellant, and John D. Lindsay, Assistant District Attorney for the respondents, due deliberation being had thereon, it is

Ordered and adjudged, that the said judgment of the said Court of Special Sessions so appealed from as aforesaid be and the same hereby is in all things affirmed. And it is further ordered that the said judgment of the said Court of Special Sessions be and the same is hereby directed to be enforced and carried in execution and effect.

(A copy.)
ALFRED WAGSTAFF,
Clerk Appellate Division, Supreme Court, First Department.

(Endorsed)—Filed February 11, 1896.

ALFRED WAGSTAFF,
[L. S.] Clerk Appellate Division, Supreme Court, First Department.

SUPREME COURT—APPELLATE DIVISION. 61

FIRST DEPARTMENT, JANUARY, 1896.

Present—The Hons. CHARLES H. VAN BRUNT, *P. J.*,
GEORGE C. BARRETT,
WILLIAM RUMSEY,
PARDON C. WILLIAMS,
GEORGE L. INGRAHAM, } *JJ.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HENRY J. HAVNOR,
Appellant.

62

No. 84.

APPEAL FROM JUDGMENT OF THE COURT OF SPECIAL SESSIONS.

Mr. JOHN R. FELLOWS, for Respondent.
Mr. A. I. SIRE, for Appellant.

INGRAHAM, *J.*—The appellant was convicted for a violation of Section I. of Chapter 823 of the Laws of 1895, and he appeals on the ground that the act is unconstitutional as a violation of the provision of the Constitution that "No person shall be deprived of life, liberty or property without due process of law." 63

The act in question prohibits any person from carrying on or engaging in the business of shaving, hair cutting, or other work performed by a barber on the first day of the week, and provides a punishment for such offense. It is claimed that the law falls within the principle established by People *v.* Jacobs, 98 N. Y., 107; People *v.* Marks, 99 N. Y.,

64 377; and People *v.* Gilson, 109 N. Y., 389. In the case last cited the principle as stated is that "A person living under our Constitution has the right to adopt and follow such lawful industrial pursuit not injurious to the community as he may see fit. * * * Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work when he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation." And in the case of the People *v.* Marks (*supra*) the Court say: "Under an exercise of the police power, the enactment must have
65 reference to the comfort, the safety or the welfare of society, and must not be in conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation." And while it is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, if its measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends.

66 Courts must be able to see upon a perusal of the enactment that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power. The question is, whether the prohibition of a particular trade upon Sunday is a violation of the principle thus established. There is nothing in this act that attempts to provide that the appellant shall not carry on his particular trade or calling in any manner or at any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday. An examination of the legislation of most, if

not all the States, will show that that subject was 67
regulated by statute prior to the adoption of the Federal Constitution and of the Constitution of this State; and the prohibition of work upon Sunday, more or less severe, was in force in all the States at that time, and the right of the Legislature to regulate the observance of the Sabbath has been recognized without exception by this and some of the States since the formation of our Government.

Thus in the case of the People *v.* Moses, 140 N. Y., 215, the Court say: "The Christian Sabbath is one of the civil institutions of the State, and that the Legislature, for the purpose of promoting the moral and physical well being of the people, and the 68
peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration by any appropriate legislation, is unquestioned." The Legislature thus having the authority to regulate the observance of the Sabbath, we cannot review its discretion, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the Legislature. (See People *v.* Bolton, 55 N. Y., 54.)

In the case of Lindenmuller *v.* People, 33 Barb., 554, a case that has been cited with approval in many cases, it was expressly held that the Legislature has the power to determine what acts it is necessary to prohibit on Sunday for the purpose of 69
promoting the moral and physical well-being of the people, and for the purpose of preventing desecration of the Sabbath; that it was a matter within the Legislature's discretion and power and that the Courts could not review their discretion and sit in judgment upon the expediency of their acts. It is for the Legislature to say what business it is necessary to prevent for the proper regulation or observance of the Sabbath; and so long as the regulations described have relation to that particular object, the discretion of the Legislature cannot be controlled by

70 the Court. This is in accord with the case of the People *ex rel.* Hobach *v.* Sheriff, 13 Misc. 587.

The objection is also made to this act on the ground that it is class legislation, granting a privilege to persons transacting business in New York and Saratoga which is not allowed outside of those localities. We do not think that the act can be questioned upon this ground. If the Legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the State it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality thickly settled should be prohibited, which in
71 sparsely settled districts of the State could be allowed; and for this reason an act might be objectionable in one district which will not in another. All of these regulations have in view the proper observance of the day and are within the discretion of the Legislature (Matter of Bayard, 25 Hun, 546).

We have been referred to the case of People *v.* Eden, decided by the Circuit Court of Cook County, Illinois, in which it appears to have been held that the Legislature cannot single out any one calling and make it the subject of special legislation. We cannot assent to the views there expressed so far a they relate to laws passed regulating the observance of Sunday. In the case of People *v.* Lindenmuller
72 (*supra*) a prohibition of theatrical performances on Sunday was expressly upheld; and the prohibition of the sale of liquor on Sunday has been always recognized as the proper exercise of the power of Legislature. It is for the Legislature to say what trades or callings can be carried on with due regard to the observance of the Sabbath.

We think, therefore, that the act was clearly within the power of the Legislature, and that the conviction must be affirmed.

All concur.

NEW YORK SUPREME COURT. 73

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

AGAINST

HENRY J. HAVNOR,
Defendant.

Please take notice, that the defendant, Henry J. Havnor, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, entered February 7, 1896, in affirmance of the judgment of conviction rendered against defendant in the Court of Special Sessions on the 4th day of November, 1895, and from each and every part of said judgment and order. 74

Yours respectfully,

ALBERT I. SIRE,
Attorney for Defendant H. J. Havnor,
99 Nassau Street,
N. Y. City.

NEW YORK, Feb. 18, 1896.

75

TO JOHN R. FELLOWS, Esq.,
District Attorney.

76 NEW YORK SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant.

77 Pursuant to Section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing is a copy of the case on appeal herein to the Appellate Division of the Supreme Court and of the whole thereof and of the order affirming the judgment appealed from, the notice of appeal to the Court of Appeals from the judgment affirmed, and of all the papers on which the appeal to the Appellate Division was heard including the opinion of said Appellate Division. And it is further stipulated that certification of the foregoing record be waived and that the appeal to the Court of Appeals be heard thereon.

Dated New York, February 25, 1896.

JOHN R. FELLOWS,
78 District Attorney.
ALBERT I. SIRE,
Defendant's Attorney.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HENRY J. HAVNOR,
Appellant.

Decided April 14, 1896.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, affirming a judgment of the Court of Special 80
Sessions for the City and County of New York, which convicted the defendant of carrying on the business of a barber on Sunday afternoon after one o'clock, in violation of Chapter 823 of the Laws of 1895.

In June, 1895, the defendant was engaged in business as a barber at number 57 West Thirty-third street, in the City of New York, and had been for the period of nine years. His establishment included "eleven ordinary chairs, three baths and two ladies' hair-dressing chairs." He kept his shop open on Sunday afternoon until eight o'clock, for the purpose of shaving his customers and cutting and dressing their hair. Some of his patrons, who worked 81
late Saturday night and rose late the next day, were in the habit of being shaved on Sunday afternoon as well as others, who could not shave themselves and yet desired to be shaved every day as a matter of cleanliness. On Sunday, June 9, 1895, after one o'clock in the afternoon, the defendant's shop was open and he was present while one of his employees shaved a customer, and payment for the service was made to the defendant in person.

No other material facts appeared upon the trial, which resulted in the conviction of the defendant, who was fined five dollars. The judgment was af-

firmed by the Appellate Division, and the defendant brought this appeal.

ALBERT I. SIRE, for Appellant.
JOHN D. LINDSAY, for Respondent.

VANN, *J.*—The main ground upon which the defendant asks us to reverse the judgment against him is that the statute under which he was convicted is in conflict with that provision of the Constitution which provides that "no person shall be deprived of life, liberty or property without due process of law" (Const., Art. 1, § 6). The statute in question, entitled "An act to regulate barbering on Sunday," provides that "any person who carries on or engages in the business of shaving, hair cutting or other work of a barber on the first day of the week shall be deemed guilty of a misdemeanor * * * provided that in the City of New York and the Village of Saratoga Springs barber shops * * * may be kept open and the work of a barber performed therein until one o'clock of the afternoon of the first day of the week" (L., 1895, Chap. 823).

The defendant claims that this statute deprives him to a certain extent of his "liberty," by preventing him from carrying on a lawful calling as he wishes, and also of his "property," by preventing the free use of his premises, tools and labor, and thus rendering them less productive. It is not claimed that his occupation is of a noisy nature, or that he so carried on his business as to disturb the peace, quiet and good order of the neighborhood, or that the act for which he was convicted, if done on any day of the week other than the first, or at any hour of that day prior to one o'clock in the afternoon, would have been a violation of law. Nor is it claimed that the conviction was authorized by the common law, or that it was based upon any statute except the one above cited, and, indeed, the judgment of the Court of Special Sessions expressly refers to that act and ad-

judges the defendant guilty of misdemeanor be- 85
cause he violated its command.

The phrase "due process of law" is not satisfied by a judgment pronounced, after an opportunity to be heard, by a court of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law (*Wynehamer* v. *People*, 13 N. Y., 378, 393). In a broad sense, whatever prevents a man from following a useful calling is an invasion of his "liberty," and whatever prevents from freely using his lands or chattels is a deprivation of his "property" (*Bertholf* v. *O'Reilly*, 74 N. Y., 515; *In re Jacobs*, 98 N. Y., 98, 105). Yet, during the history of our State many laws have been passed which, to some 86
extent, have interfered with the right to liberty and property, but their accord with the Constitution has seldom been questioned, and, when questioned, has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals and to provide for the public safety may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guarantees of the Constitution. While the confinement of the insane or of those afflicted with contagious diseases infringes upon personal liberty, and the destruction of buildings to prevent the spread of fire, the exercise of the power of eminent domain and the prevention of cruelty to animals encroach upon the 87
right to property, still the proper exercise of these powers, under the authority of the Legislature, although constant and known of all men, gives rise to no question of moment under the Constitution. The sanction of these apparent trespasses upon private rights is found in the principle that every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. Dependent upon this principle is the great police power, so universally recognized,

but so difficult to define, which guards the health, the welfare and the safety of the public. While this power may not be employed ostensibly for the common good, but really for an ulterior purpose, when its object and effect are manifestly in the public interest, as was said in the *Jacobs* case, "it is very broad and comprehensive, and * * * under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other" (p. 108). In the exercise of this power the Legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety, yet its discretion in this respect is not wholly without limit, for our courts have been steadfast in holding that the statute must have some relation to the general welfare; that the purpose to be reached must be a public purpose, and that "the law must in fact be a police law." Thus it has been held that "an act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases" (L. 1884, Chap. 272) was unconstitutional, because it did not tend to promote the public health, and that this was not the end actually aimed at (*In re Jacobs*, *supra*). For the same reason "An act to prevent deception in sales of dairy products" (L. 1881, Ch. 202), was declared to conflict with the Constitution, as it absolutely prohibited an innocent industry that was not fraudulently conducted, solely for the reason that it competed with another and might reduce the price of an article of food (*People* v. *Marx*, 99 N. Y., 377). When, however, the act was so changed as to make the substance accord with the title (L. 1885, Ch. 183), it was held to be constitutional (*People* v. *Arensburg*, 105 N. Y., 123). In a recent case, an act prohibiting the sale of any article of food upon the inducement that something would be given to the purchaser as a premium or reward (L. 1887, Ch. 691), was held to be an unauthorized invasion of the rights of property and an

improper exercise of the police power of the State. 91
(*People* v. *Gillson*, 109 N. Y., 389). It was expressly declared in that case that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the common good, and that unless such relation exists the statute cannot be upheld as an exercise of the police power.

Subject, however, to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the Legislature is well established as not in conflict with the Constitution (*Heisler* v. *Metropolitan Board of Health*, 37 N. Y., 661, 669; *Matter of Deansville* 92
Cemetery Association, 66 N. Y., 569; *In re Ryers*, 72 N. Y., 1, 7; *People ex rel. Kemp* v. *D'Oench*, 11 N. Y., 359; *People* v. *Ewer*, 141 N. Y., 129; *People ex rel. Nechamcus* v. *Warden, etc.*, 144 N. Y., 529; *Health Department* v. *Rector, etc.*, 145 N. Y., 432). When thus exercised, even if the effect is to interfere to some extent with the use of property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights (*Phelps* v. *Racey*, 60 N. Y., 10, 14; *Prentice* v. *Weston*, 111 N. Y., 460).

The vital question, therefore, is whether the real pur- 93
pose of the statute under consideration has a reasonable connection with the public health, welfare or safety. The object of the act, as gathered from its title and text, was to regulate the prosecution of a particular trade on Sunday, by prohibiting it from being carried on as a business, on that day, except in two localities to which the prohibition applies only after a certain hour. It does not require the observance of the Sabbath as a holy day, or in any sense as a religious institution, as is evident from the fact that the entire day is left open to all secular employ-

94 ments but one, and a part of the day, in certain places, to that. There is nothing in the act to prevent the defendant from carrying on his trade "in any manner or in any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday."

The peculiar character of the first day of the week, not simply on account of the obligations of religion, but as a day of rest and recreation, has been recognized for time out of mind both by the Legislature and the courts. Statutes passed upon the subject while we were a colony of Great Britain, as well as under the various Constitutions in force since our organization as a State, have, so far as appears,
95 been uniformly enforced by the courts (29 Car., II., c. 7; 2 Green., 89; Andrews, 467; 1 R. L., 194; 2 R. S., 675, § 70; L. 1788, Ch. 42; L. 1801, Ch. 34; L. 1847, Ch. 349; L. 1883, Ch. 358).

Similar laws in other States, and especially those which require the closing of places of business on Sunday, have generally been sustained (*People* v. *Ballot*, 39 Mich. 151; *Vogsang* v. *State*, 9 Ind., 112; *Shover* v. *State*, 10 Ark., 259; *Warne* v. *Smith*, 8 Conn., 14; *Bloom* v. *Richards*, 2 Ohio, 287; *Specht* v. *Commonwealth*, 8 Pa. St. 312; *Commonwealth* v. *Has*, 122 Mass., 40; *Bohl* v. *State*, 3 Tex. App., 683; Cooley's Cons. Lim. (5th Ed.) 589, 726; Tiedeman's Lim. of Police Power, 183; Hare's Am. Cons. Law, 766).

96 While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced. The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is

an incident to all general laws. Sunday statutes have 97
been sustained as constitutional almost without exception, the most notable instance to the contrary, *Ex parte Newman* (9 Cal. 502), decided by a divided court in an early day in California, having been subsequently overruled by the courts of that State. (*Ex parte Andrews*, 18 Cal. 685; *Ex parte Koser*, 60 Cal., 202.)

The leading case in our own State upon the subject is that of *Lindenmuller* v. *People* (33 Barb. 548), in which Judge ALLEN discussed the common law as well as legislation affecting the Sabbath with great force and clearness. He held, in substance, that the body of the Constitution recognizes Sunday as a day of rest and an 98
institution to be respected, by not counting it as a part of the time allowed to the Governor for examining bills submitted for his approval; that the Sabbath exists as a day of rest by the common law without the necessity of legislative action to establish it; and that the Legislature has the right to regulate its observance as a civil and political institution. That case was expressly approved in *Neuendorff* v. *Duryea* (69 N. Y., 557, 561, 563) and was referred to as one "which has never been questioned in a court of higher or equal authority," and "as declaring the law of this State." It was cited with approval in *People* v. *Moses* (140 N. Y., 214, 215), where Judge EARL, speaking for a majority of the 99
Court, said: "The Christian Sabbath is one of the civil institutions of the State, and that the Legislature for the purpose of promoting the moral and physical well-being of the people and the peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration by any appropriate legislation is unquestioned." While works of charity and necessity have usually been excepted from the effect of laws relating to the Sabbath, and sometimes, also, those persons who keep another day of the week, still quiet pursuits have not, even when they can be carried on

100 without the labor of others, because general respect and observance of the day, so far as practicable, have been deemed essential to the interest of the public, including as a part thereof those who prefer not to keep the day, as their health and morals are entitled to protection, even against their will, the same as those of any other class in the community. According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business. (*Lindenmuller* v. *People*, *supra*.)

101 It is to the interest of the State to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the State, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the Constitution, which "presupposes its ex-

102 istence, and is to be construed with reference to that fact." (*Village of Carthage* v. *Frederick*, 122 N. Y., 268, 273.)

The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: "If

the law did not interfere, the feverish, intense desire 103
to acquire wealth, * * * inciting a relentless rivalry and competition, would ultimately prevent not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature and obeying the instinct of self-preservation by resting periodically from labor" (Tiedeman's Lim. Police Powers, 181). As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.

We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose of the utmost importance 104
by promoting the observance of Sunday as a day of rest. It follows, therefore, that it does not go beyond the limits of legislative power by depriving any one of liberty or property within the meaning of the Constitution.

The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the fourteenth amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a State, nor to legislation which, in carrying out a public 105
purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated (*Missouri* v. *Lewis*, 101 U. S., 22, 30; *Barbier* v. *Connolly*, 113 U. S., 27, 31). It was not designed to interfere with the exercise of the police power by the State for the protection of health, or the preservation of morals (*Powell* v. *Pennsylvania*, 127 U. S., 678, 683). The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circum-

106 stances and conditions, both in the privileges conferred and in the liabilities imposed (*Hayes* v. *Missouri*, 120 U. S., 68). As was said by the learned Appellate Division in deciding this case: "If the Legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the State it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited which in sparsely settled districts of the State could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observ-
107 ance of the day, a .d are within the discretion of the Legislature."

We think that the statute violates no provision of either the Federal or State Constitution, and that the judgment appealed from should, therefore, be affirmed.

GRAY, *J.* (dissenting). This enactment can only find its justification, in my opinion, in an attempted exercise of the police power of the State. I cannot suppose that it is to be defended as a proper or reasonable extension of the "Sunday law" of the State. That law includes in the works of necessity, which it permits, "whatever is needful for the good
108 order, health or comfort of the community." The occupation of the barber has not been deemed unlawful under it, and it would look like a relapse into the narrow groove of earlier Puritanical belief if we should now regard it as inconsistent with the due observance of the Sabbath day. Conceding, as I do, to the Legislature a wide range in the exercise of what is known as the police power, I think that, in this piece of legislation, it has overstepped the limits and has infringed upon the constitutional guarantees, which, in effect, assure to us the enjoyment of our liberty and of our property in all reasonable ways. While it has been frequently ob-

served that it is difficult to define the limits of the police power of the State, it is, nevertheless, agreed that an enactment in that direction must be one having reference to the comfort, the safety or the welfare of society. A line of decisions in the Federal and State Courts has erected these as monuments to denote the boundaries of this extraordinary power which is deemed to reside in the legislative agents of the people of the State. We know that this power is not above the Constitution; but that it is subject to it, and when legislation violates any of its provisions, in the letter or the spirit, it is the duty of the Courts, upon the faithful performance of which the people confidently rely, to interpose the barrier of their judgments against its enforcement. Under the constitutional guaranty every one is at liberty to follow any lawful avocation which is not injurious to the community, and to enjoy its fruits, and any interference by the Legislature, under the guise of a police regulation, must be seen by the Court to have some real reference to the common good. The mere declaration of the Legislature is not conclusive. It cannot seriously be said that the defendant's business is one that conflicts with the comfort, safety or welfare of the community when carried on upon the first day of the week, called Sunday. It is in its nature a peaceable occupation, and, as usually conducted, cannot and does not interfere with the quiet of the day, or with the performance by any citizen of the duties of the day, however appointed. It is one that not merely conduces to the comfort of the individual, but promotes his decent appearance as a member of the community, and it is quite impossible to conceive of the business as in any reasonable way militating against the requirements of society with respect to the Sabbath day.

109 110 111

The learned Justices of the Appellate Division have thought that it is discretionary with the Legislature to enact laws for the regulation of the observance of the Sabbath. That discretion does exist, so far as to prevent what is, or amounts to, a desecra-

112 tion of the day, as was decided in *People* v. *Moses* (140 N. Y., 215); but it should not be deemed to exist, so far as to interfere with a peaceable calling, and more or less necessary to the comfort and decency of members of the community.

But this legislation, in my judgment, is particularly objectionable and deserving of judicial condemnation, for the reason that it discriminates unreasonably in dealing with those who are engaged in the pursuit of a lawful avocation. It certainly must be implied in our governmental system that legislation shall be equal as to all and just in its commands. If that were not so, government by the people for the people would exist but in name. The
113 fundamental guarantees, on which rest our social structure, would be delusive. The Legislature cannot act arbitrarily, and if this act is to be defended as a proper exercise of the police power, then it is without shadow of excuse, in discriminating against barbers who do not reside in the City of New York, or in the Village of Saratoga Springs. Legislation which discriminates in this wise is not in harmony with the idea of our democratic form of government. Where it touches the pursuit by individuals of a lawful avocation it should act with impartial hand, affecting all alike and subjecting every one interested to the same restraints for the sake of the common good. There is no sensible or plausible
114 reason for the discrimination made by this law. It is unnecessary, unreasonable and hostile to the true policy of the State. Regarded as an exercise of the police power it cannot be justified as either necessary for the good of society, or as conducive to its welfare; and it is violative of constitutional principles, in that it restrains unduly and unequally the liberty of those engaged in a lawful business.

I think the judgment should be reversed and that the defendant should be discharged.

BARTLETT, *J.* (dissenting). While this Court has very properly held that the Christian Sabbath is one of the civil institutions of the State and that the

Legislature may regulate its observance and prevent 115
its desecration (*People* v. *Moses*, 140 N. Y., 214), I think the case at bar presents an instance where the lawmakers have overstepped the bounds of legitimate legislation in the alleged exercise of the police power. Chapter 823, Laws of 1895, provides substantially that any person who engages in the business of a barber on the first day of the week shall be deemed guilty of a misdemeanor, provided that in the City of New York and the Village of Saratoga Springs barber shops may be kept open until one o'clock of the afternoon of the first day of the week.

The Penal Code provides (§ 263) that all labor on Sunday is prohibited, excepting the works of neces- 116
sity or charity.

These works are then defined as including "whatever is needful during the day for the good order, health or comfort of the community." The Legislature by permitting barber shops to remain open for a portion of the first day of the week in two localities of the State necessarily proceeded upon the theory that the business of the barber is a work of necessity contributing to the comfort of the community.

I think it clearly within the power of the Legislature, in order to regulate the observance of the Sabbath, to control the hours during which a barber shop may be kept open on the first day of the week 117
even if the comfort of the community may be to some extent interfered with in so doing.

This principle is recognized by the Penal Code (§ 267), which prohibits the public sale of any property upon Sunday, but allows articles of food to be sold and supplied before ten o'clock in the morning and certain articles of personal property to be sold during the entire day.

If then the business of the barber is work of necessity contributing to the comfort of the community, can it be a reasonable exercise of the police power to arbitrarily extend the comfort of a Sunday morning

118 shave to the inhabitants of the City of New York and the Village of Saratoga Springs and deny it to the rest of the State including great cities like Brooklyn and Buffalo?

I think the act under consideration is vicious class legislation and in direct violation of the fourteenth amendment of the Constitution of the United States, which provides that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The act is, in my judgment, a specimen of grotesque and absurd legislation resting upon no principle of public policy and utterly indefensible
119 under any reasonable or proper exercise of the police power.

The Supreme Court of the United States has held that the fourteenth amendment does not impair the police power of a State (*Barbier* v. *Connolly*, 113 U. S., 27), and it has further decided that it does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is operated (*Hayes* v. *Missouri*, 120 U. S., 68, 71). There is, however, nothing in these adjudications which will sustain the act under consideration. In the exercise of the police power the Legislature is vested with the amplest discretion, the precise limits of which cannot be accurately de-
120 fined, but there is a point beyond which that discretion cannot be exercised.

The language of Judge PECKHAM in delivering the opinion of this Court in *People* v. *Gillson* (109 N. Y., at page 401), is apposite. The learned judge, referring to the *Matter of Jacobs* (98 N. Y., 98), said: "As is also said in the last case, it is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient or appropriate to accomplish such ends the exercise of its discretion is not the subject of

judicial review. But those measures must have 121
some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exist the enactment cannot be upheld as an exercise of the police power."

Can it be said, after a perusal of the act in question, that its provisions are a reasonable and proper exercise of the police power?

I think not; it is an arbitrary, discriminating exercise of that power which ought not to be tolerated.

The good offices of the barber, being a work of necessity needful on Sunday for the comfort of the 122
community, should be extended to all portions of the State alike.

It is true the Legislature might allow the barber shops to remain open longer on Sunday in a great city than in a country village, but subject to reasonable regulation as to hours all barbers and their customers are entitled to the equal protection of the laws.

The claim that the work of the barber is one of necessity, needful during the early hours of Sunday for the comfort of the community, rests upon years of practical construction of the various laws regulating the observance of the Sabbath.

I think that chapter 823, Laws of 1895, is void as 123
violating the fourteenth amendment of the Constitution of the United States, and for the further reason that it is not a proper exercise of the police power.

The judgment appealed from should be reversed.

All concur, with VANN, *J.*, for affirmance, except GRAY and BARTLETT, *JJ.*, who dissent, each reading for reversal, and HAIGHT, *J.*, who concurs in both dissenting opinions.

Judgment affirmed.

(A copy.)

E. H. SMITH,

Reporter C.

124 COURT OF APPEALS.

State of New York, ss.:

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-six, before the Judges of said Court.

Witness—The Hon. CHARLES ANDREWS,
Chief Judge, presiding.

125 GORHAM PARKS,
Clerk.

Remittitur, April 14, 1896.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant.

126 Be it remembered that on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and ninety-six, Henry J. Havnor, the appellant in this action, came here into the Court of Appeals, by Albert I. Sire, Esq., his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the Appellate Division of the Supreme Court, First Department.

And the People of the State of New York, the respondents in said action, afterwards appeared in said Court of Appeals, by John R. Fellows, Esq., their District Attorney.

Which said notice of appeal and the return thereto 127
filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Albert I. Sire, of counsel for the appellant, and by Mr. John D. Lindsay, Assistant District Attorney, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court appealed from in this action be in all things affirmed.

And it was also further ordered that the record aforesaid and the proceedings of this Court, be remitted to the said Supreme Court of the First Department, there to be proceeded upon according to law.

128

Therefore it is considered that the said judgment be in all things affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the First Department before the Justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justice thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of
the State of New York.

129

COURT OF APPEALS, CLERK'S OFFICE, }
ALBANY, April 14, 1896. }

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS,
Clerk.

[SEAL.]

130 At a Special Term of the Supreme Court, held in and for the City and County of New York, at the City Hall in the City of New York, on the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present—The Honorable FREDERICK SMYTH, *Justice.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

131 AGAINST

HENRY J. HAVNOR,
Appellant.

Order on Remittitur.

Whereas, heretofore, to wit, at a term of the Court of Special Sessions, begun and holden in and for the City and County of New York, at the Criminal Courts Building in said city, on the first Monday of November, in the year of our Lord one thousand eight hundred and ninety-five, to wit, on the 4th day of November in the year aforesaid, the
132 above named appellant was in due form of law convicted of a misdemeanor, whereupon, to wit, on the said 4th day of November it was considered by the Court and ordered and adjudged, that the said appellant, for the misdemeanor aforesaid whereof he was so convicted as aforesaid, pay a fine of five dollars;

And whereas, the appellant aforesaid thereafter duly appealed from the said judgment to the Supreme Court, Appellate Division, of the State of New York;

And whereas, at a term of the said Appellate Division of the Supreme Court, held in and for the

45 first judicial department, to wit, at the court-house thereof in the city of New York on the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-six, the said judgment of the said court of special sessions was by the judgment of the said appellate division of the supreme court in all things affirmed;

And whereas, the appellant aforesaid thereafter duly appealed from the said judgment of the appellate division to the court of appeals of the State of New York;

And whereas, at a term of the said court of appeals, held at the capitol in the city of Albany, on the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-six, the said judgment of the said appellate division was by the judgment of the said court of appeals in all things affirmed, and the record herein, and the proceedings in the said last-mentioned court upon the said appeal, were by the said judgment remitted to this court, there to be proceeded upon according to law, as by the remittitur of the said court of appeals now on file in this court more fully appears;

Now, therefore, on reading and filing the said remittitur, and on motion of John R. Fellows, Esq., district attorney, it is

Ordered, that the said judgment of the said court of appeals be and the same is hereby made the judgment of this court; and it is further

Ordered, that the said judgment of the said court of special sessions so appealed from as aforesaid and so affirmed, and the said judgment of the appellate division of the supreme court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

FREDERICK SMYTH, *J. S. C.*

46 All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Hon. F. Smyth, a justice of the supreme court for the city and county of New York, the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and ninety-six, of our Independence the one hundred and twentieth.

[SEAL OF NEW YORK.] HENRY D. PURROY, *Clerk.*

I, F. Smyth, a presiding justice at a special term of the supreme court of the State of New York for the city and county of New York, do hereby certify that Henry D. Purroy, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, April 27th, 1896.

F. SMYTH,
Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Henry D. Purroy, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Hon. F. Smyth, whose name is subscribed to the preceding certificate, is presiding justice at chambers of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 27th day of April, 1896.

[SEAL OF NEW YORK.] HENRY D. PURROY, *Clerk.*

47 Due service of a copy of within writ and citation admitted.
N. Y., August 6, 1896.

JOHN R. FELLOWS,
District Attorney.

In the Supreme Court of the United States.

Ex Parte HAVNOR, Petitioner.

Petition for Writ of Error, &c.

Albert I. Sire, attorney for petitioner, 99 Nassau street, New York.

48 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between The People of the State of New York, plaintiff, and Henry J. Havnor, defendant, a manifest error is said to have happened, to the great damage of the said Henry J. Havnor, as appears by his petition, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. SHIELDS,
Clerk Circuit Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

EDWARD T. BARTLETT,
Asso. Judge N. Y. Court of Appeals.

49 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York:

You are hereby cited and admonished to appear at a term of the United States Supreme Court, to be held at the Capitol, in Washington, D. C., on the second day of September, one thousand eight hundred and ninety-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry J. Havnor is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties.

New York, August 6th, 1896.

EDWARD T. BARTLETT,
Associate Judge Court of Appeals, State of New York.

50 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error,
against
HENRY J. HAVNOR, Plaintiff in Error.

Assignment of Errors.

Afterward, to wit, on the — day of ——, 1896, before the justices of the court of appeals of the State of New York, the plaintiff in error says that in the record and proceedings of the above-entitled cause there was manifest error committed, in this:

That whereas heretofore an act was passed by the legislature of the State of New York, which is now in force, entitled chapter 823 of the Laws of 1895, which provided as follows:

"An act to regulate barbering on Sunday.

"SECTION 1. Any person who carries on or engages in the business of shaving, hair-cutting or other work of a barber on the first day of the week, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than five dollars and upon a second conviction for a like offense shall be fined not less than ten dollars and not more than twenty-five dollars, or be im-

prisoned in the county jail for a period of not less than ten days nor more than twenty-five days or be punishable by both such fine and such imprisonment at the discretion of the court or magistrate
51 provided that in the city of New York and the village of Saratoga Springs, barber shops or other places w-ere a barber is engaged in shaving, hair-cutting or other work of a barber may be kept open and the work of a barber may be performed therein until one o'clock of the afternoon of the first day of the week."

"SECTION 11. This act shall take effect on the first day of June, 1895."

That whereas on the 9th day of June, 1895, plaintiff in error was arrested by the direction of the police authorities of New York city on the charge of violating said act on the day of the arrest (Sunday) by keeping open shop after one p. m., on which charge petitioner was afterward, on the fourth day of November, 1895, tried and fined five dollars by the court of special sessions in New York city, which was paid under protest and an appeal taken from the judgment of conviction to the appellate division of the supreme court of the State of New York, first department, where said conviction was affirmed on the seventh day of February, 1896, and on a second appeal to the court of appeals of the State of New York said conviction was again affirmed by a divided court, which stood four for and three against affirmance, and decisions rendered on the 14th day of April, 1896;

And whereas plaintiff in error contended before said court that said conviction was illegal because the same was violative of the fourteenth amendment of the Constitution of the United States, providing that "no person shall be deprived of life, liberty, or property without due process of law," and of the corresponding clause in the constitution of the State of New York. (See art. 1, sec. 1.) That said court of appeals by said decision and by the judgment entered in pursuance thereof in the supreme court of the State of New York decided, against the contention of the plaintiff in error, that said conviction was valid, and that the said chapter 823 of the Laws of 1895 was not at variance with the Constitution of the United
52 States or of the State of New York and was a proper exercise of the police power of the State of New York, wherein was error, as is contended, in that by the law of the land the said judgment ought to have been given for the said Henry J. Havnor against the defendant in error on the ground that said chapter 823 aforesaid of the Laws of 1895 of the laws of New York is unconstitutional; so that plaintiff in error prays that such judgment and order aforesaid be reversed, annulled, and held *for* nothing, and that he may be restored to all things he hath lost by reason of the said judgment of the said court of appeals.

N. Y., June 23, 1896.

ALBERT I. SIRE,
Attorney for P'ff in Error.

53 Supreme Court of the State of New York, City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
vs.
HENRY J. HAVNOR, Defendant.

Know all men by these presents that we, Henry J. Havnor, as principal, and William J. Devlin, as surety, of the city of New York, are held and firmly bound unto the above-named The People of the State of New York in the sum of two hundred & fifty dollars, to be paid to the said The People of the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 23rd day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Henry J. Havnor has applied to the court of appeals of the State of New York for a writ of error to the Supreme Court of the United States from a judgment of the N. Y. supreme court, entered April 20th, 1896, on a remittitur from the New York court of appeals, dated April 14th, 1896, affirming a judgment convicting plaintiff in error of a violation of chapter 823 of the Laws of 1895, to reverse the said judgment entered in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his ap-
54 peal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

WM. J. DEVLIN. [SEAL.]
H. J. HAVNOR. [SEAL.]

Sealed and delivered and taken and acknowledged this 7th day of July, 1896, before me—
WARREN S. BURT,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City and County of New York.

William J. Devlin, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

WM. J. DEVLIN.

Sworn to this 7th day of July, A. D. 1896, before me—
D. S. VOORHEES,
Comm'r of Deeds, City & Co. of N. Y.

Bond approved.

EDWARD T. BARTLETT,
Asso. Judge N. Y. Court of Appeals.

New York, July 30, 1896.

55 In the Matter of the Petition of HENRY HAVNOR for Writ of Error.

CITY AND COUNTY OF NEW YORK, *ss.*:

Albert I. Sire, being duly sworn, says that he is attorney for Henry Havnor, the petitioner herein; that deponent is informed and believes that Hon. Charles Andrews, chief judge of the court of appeals of the State of New York, is now abroad in Europe, and will be for some space of time to come; that the sources of deponent's information are derived from a recent letter received from the clerk of the court of appeals, Gorham Parks, Esq.

ALBERT I. SIRE.

Sworn to before me this 29th day of July, 1896.

MEYER GREENBERG,
Notary Public (59), *N. Y. Co.*

Endorsed on cover: Case No. 16,375. New York supreme court. Term No., 227. Henry J. Havnor, plaintiff in error, *vs.* The People of the State of New York. Filed September 2, 1896.